

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2019/0003

BETWEEN:

PIC INSURANCE COMPANY LTD.

Appellant

and

[1] ZONA BARTHLEY AND ZOROL BARTHLEY
(Personal Representatives of the Estate of Dr. Rolston Barthley, Deceased)
[2] ZOROL BARTHLEY

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Anthony Astaphan, SC, with him Dr. David Dorsett and Mr. Jarid Hewlett, for
the Appellant
Mr. Kendrickson Kentish and Mr. Kyle Kentish for the Respondents

2020: January 17;
2021: January 28.

Civil appeal – Company law – Dispute over ownership of shares in company – Whether judge erred in finding that respondents were the owners and/or entitled to 51% and 5% of the shares in the company - Approach of appellate court to findings of fact – Whether judge failed to properly consider sections 29, 30 and 85 of the Companies Act – Whether judge erred in failing to hold that the Board of Directors was required to assess any claim for shares to determine the fair equivalent in value of services provided by first respondent before allocating or issuing shares – Section 241 of Companies Act – Oppression remedy – Whether judge erred in declaring that the decision of the Board of Directors to appoint an

assessor to value the respondents' share and the failure of the Board to allot shares to them were oppressive or unfairly prejudicial to or disregarded the interests of the respondents

PIC Insurance Company Limited ("the company") is a general insurance company formed by Dr. Rolston Barthley ("Dr. Barthley") in March 2001. The company began its operations around March 2002 and was run by Dr. Barthley until his death in September 2005. Whilst Dr. Barthley was alive, he was treated as the majority shareholder and effective controller of the company. However, after his death, disputes arose regarding his standing in the company, including his apparent control of the company, manifested in the ownership of majority shares.

In October 2005, a shareholders' meeting of the company was convened to resolve disputes concerning the distribution of the company's shares. At this meeting, the shareholders discussed a document dated 31st March 2003, which had been prepared by an official from the company's auditors, Mr. Wilbur Harrigan ("the Harrigan document"), showing an allocation of 510,000 shares or 51% of the issued shares to Dr. Barthley and 50,000 or 5% of the issued shares to his son, Zorol Barthley. The allocation of shares reflected in the Harrigan document followed discussions held between Mr. Harrigan and Dr. Barthley. The October 2005 meeting was adjourned to 5th December 2005 to enable the shareholders to arrive at an agreement among themselves on the ownership of the shares in the company. On 5th December 2005, the shareholders agreed to proceed, for the time being at least, on the basis of the Harrigan document. However, the annual return of the company for the year ending 31st December 2005, signed by both the Managing Director and Director/Secretary of the company, did not reflect the share distribution contained in the Harrigan document, or any other share distribution; but the annual returns of the company for the years ending 31st December 2006 to 31st December 2011, and a document entitled 'PIC first shareholders' meeting' dated 4th July 2002, all reflected the share distribution contained in the Harrigan document.

To resolve the dispute between the representatives of the estate of Dr. Barthley and Zorol Barthley (collectively "the Barthleys") on the one hand and the other shareholders on the other hand, the Board instructed the company's auditors to assess the basis of the share allocations and subsequently resolved to refer the dispute to arbitration. The Board subsequently appointed an assessor to value the Barthleys' shares in order to assist the Board in the allocation of the shares in the company. The Board also decided to engage Senior Counsel to represent the company in the assessment, with Counsel's fees to be paid by the company, but with no provision to pay the legal fees of the Barthleys as the other party to the assessment. The Barthleys were aggrieved by the decision of the Board to appoint the assessor and the refusal of the Board to formally allocate their shares to them and, as a result, they instituted proceedings against the company seeking declarations as to the shareholdings of the Barthleys and as to the oppressive or unfairly prejudicial conduct which they alleged that the Board of Directors displayed to them, and seeking also injunctions, damages and costs.

At the conclusion of the trial, the learned judge gave judgment in favour of the Barthleys and granted the declarations which they sought.

The company, being dissatisfied with the learned judge's findings, appealed. From the several grounds of appeal filed, the Court narrowed down the issues to be determined to the following three questions: (i) whether the learned judge erred in making the factual findings that she did; (ii) whether the learned judge failed to properly consider sections 29, 30 and 85 of the Companies Act and to hold that the Board was required to assess any claims for shares to determine whether the services provided to the company by Dr. Barthley and Zorol Barthley represented the fair equivalent in money of the value of the shares claimed by them before agreeing to issue, allot or transfer any shares to the Barthleys; and (iii) whether the Board's decision to have the value of the Barthleys' shares assessed and its failure to allot their shares to them were oppressive or unfairly prejudicial to or disregarded their interests, contrary to section 241 of the Companies Act.

Held: dismissing the appeal, affirming the judgment of Joseph-Olivetti J [Ag.], and awarding costs to the Barthleys in the sum of two-thirds of the costs awarded in the court below, that:

1. When confronted with the choice between two versions of the events leading to the establishment and operation of the company and the allocation of the shares in it, the trial judge chose (and explained why she was doing so) the version presented by the respondents over the one presented by the appellant. This was her right, and indeed her responsibility as the trier of the facts, and she would therefore have foregone her right and abdicated her responsibility if she had failed to choose between the two versions.
2. There is a long line of cases, starting from the case of **Watt v Thomas** in 1947 and continuing through to several cases over the years both in England and in the countries of the British Commonwealth, including cases from our own jurisdiction, where the courts have consistently pronounced on the role of appellate courts in dealing with findings of fact made by first instance courts. As recently as last year, this Court – in the Antiguan case of **Flat Point Development Limited v Mary Dooley** – applied *Watt v Thomas* in affirming the primacy of the role of the trial judge in a civil trial in resolving the factual disputes between the parties. Once the trial judge has done so and has done so based on evidence which was before her, the appellate court should not interfere with the judge's findings of fact.

Watt or Thomas v Thomas [1947] AC 484 applied; **Flat Point Development Limited v Mary Dooley** [2019] ECSCJ No. 116, delivered on 13th March 2019 followed.

3. Sections 29, 30 and 85 of the Companies Act do not impede the Board of Directors of the company, or the court if necessary, from allocating 51% and 5% of the shares to Dr. Barthley and Zorol Barthley respectively. The measure of value of the services provided by Dr. Barthley against the shares allotted to him, must be what was agreed to or acquiesced in at the time by him and those who joined him as shareholders in the company. The evidence supports an agreement by or acquiescence of the shareholders to an allocation of the majority shareholding to Dr. Barthley for his incorporation, operationalisation and running of the company without any remuneration, but for the allocation of the majority shareholding to him. Though the impact of sections 29, 30 and 85 of the Companies Act on the company's ability to issue or allocate shares was not specifically addressed by the learned judge, she did not err in construing the provisions of the Act in making the determination and declaration that she did in relation to the ownership and/or entitlement of the Barthleys to the shares allocated to them.

Sections 29, 30 and 85 of the **Companies Act 1995**, No. 18 of 1995 considered.

4. Section 241 of the Companies Act gives the court a broad discretion to provide redress to shareholders, among other company stakeholders, for corporate conduct that has been exercised in an oppressive or unfairly prejudicial manner or in a manner that unfairly disregards their interests. In fashioning an oppression remedy under this section, the court should be guided by four principles. Firstly, the oppression remedy must be a fair way of dealing with the situation. Secondly, any order made should go no further than necessary to rectify the oppression. Thirdly, any order may serve only to vindicate the reasonable expectation of shareholders, among other stakeholders. Fourthly, the court should consider the general corporate law context in exercising its remedial discretion.

Sections 241 of the **Companies Act 1995**, No. 18 of 1995 considered; **Wilson v Alharayeri** 2017 SCC 39 applied; **BCE Inc. v 1976 Debentureholders** 2008 SCC 69 applied.

5. In this case, the Barthleys sought section 241 relief based on their reasonable expectation that they were the majority shareholders of the company and their assertion of unfair treatment by the Board as it relates to their shareholding. In light of the judge's finding that the Barthleys were entitled to 51% and 5% of the shares of the company and their inability, without an order from the court, to preclude the Board from undermining their shareholding, and upon application of

the principles set out in **Wilson v Alharayeri**, the learned judge was entitled to determine that the decision of the company to appoint an assessor and its refusal to allot shares to the Barthleys were oppressive or unfairly prejudicial to or disregarded the interests of the Barthleys, contrary to section 241 of the Companies Act.

Sections 241 of the **Companies Act 1995**, No. 18 of 1995 considered; **Wilson v Alharayeri** 2017 SCC 39 applied; **BCE Inc. v 1976 Debentureholders** 2008 SCC 69 applied.

JUDGMENT

- [1] **MICHEL JA:** According to its official website, PIC Insurance Company Limited (“the company”) is a general insurance company founded by Dr. Rolston Barthley (“Dr. Barthley”) – ‘an Antiguan insurance professional with an international reputation for honesty, integrity and expertise in insurance’. The company was established in March 2001 and began its operations around March 2002, and was evidently run by Dr. Barthley, until his death on 25th September 2005. Whilst Dr. Barthley was alive and running the company, it did not appear that there was any dispute between him and the other investors/shareholders in the company about his status and standing in the company, including his apparent control of the company manifested (in a company limited by shares) in the ownership of the majority of the shares in the company.
- [2] The records of the company show that the first meeting of the shareholders of the company was held on 30th November 2001, but no allotment of shares was made, or distribution of shares discussed at the meeting. However, a document dated 4th July 2002 and entitled “PIC FIRST SHAREHOLDERS MEETING” contained a listing of shareholders of the company and the number of shares owned by each of them. In that document, Dr. Barthley is recorded as owning 5,100 of the 9,600 shares allotted, with 400 outstanding, whilst his son, Zorol Barthley, is recorded as owning 500 shares.

- [3] After Dr. Barthley's death in September 2005, a meeting of the shareholders of the company was convened in October 2005 to resolve differences which had surfaced concerning the share distribution in the company. A document dated 31st March 2003, which had been prepared by the company's auditors, Pannell Kerr Foster, and which showed an allocation of 510,000 shares to Dr. Barthley representing 51% of the issued shares in the company, and an allocation of 50,000 shares representing 5% of the issued shares to Zorol Barthley, was discussed at the meeting. The official from Pannell Kerr Foster who produced the document, Mr. Wilbur Harrigan, stated that the allocation of shares reflected in the document ("the Harrigan document"), came out of discussions between him and Dr. Barthley and that the other investors/shareholders in the company, including the members of the Board of Directors of the company, were not involved in the discussions.
- [4] It should be noted that whereas the Pannell Kerr Foster document dated 31st March 2003 shows Dr. Barthley as the holder of 510,000 shares and Zorol Barthley as the holder of 50,000 shares, out of a total allotment of 1,000,000 shares, the 4th July 2002 document and the annual returns for the years ending 31st December 2006 to 31st December 2011 show that Dr. Barthley is the holder of 5,100 shares and Zorol Barthley is the holder of 500 shares, out of a total allotment of 10,000 shares. Either way, all of the documents show Dr. Barthley and Zorol Barthley as being the owners and/or entitled to ownership of 51% and 5% respectively of the issued or allotted shares in the company.
- [5] The October 2005 meeting of shareholders was adjourned to 5th December 2005 to enable the shareholders to arrive at some agreement among themselves. At the resumed meeting, on 5th December, the shareholders 'agreed to proceed on the basis of the Harrigan document with the view of keeping the company functioning'. The annual return of the company for the year ending 31st December 2005 signed by Stanley Francis as Managing Director and Dane Hamilton, QC as Director/Secretary, bearing the date 11th August 2008 and filed on 22nd August

2008, did not however reflect the share distribution contained in the Harrigan document or any other share distribution. Indeed, it showed that 1 share was issued in the company (with a share capital of \$10,000.00) and 9,999 shares were unissued. This though is inconsistent with the annual returns for the preceding years ending 31st December 2003 and 31st December 2004, also signed by Stanley Francis and Dane Hamilton, QC and filed on 2nd February 2005, and both showing that 10,000 shares were issued in the company (with a share capital of \$1,000,000) but none showing the distribution of these shares; the inconsistency of course being that the later return shows that a single share was issued, while the earlier ones show that 10,000 shares were issued. Be that as it may, the annual returns of the company for the years ending 31st December 2006, 2007, 2008, 2009, 2010 and 2011 all reflect the share distribution contained in the Harrigan document, showing Dr. Barthley as the holder of 51% of the shares issued in the company, and Zorol Barthley as the holder of 5% of the issued shares.

- [6] After the death of Dr. Barthley in September 2005, there ensued a prolonged dispute, which is still ongoing, between the representatives of the estate of Dr. Barthley and his son, Zorol Barthley (hereafter referred to collectively as “the Barthleys”) on the one hand and the other shareholders in the company on the other hand, over the distribution of the shares in the company, in particular, the shareholding of Dr. Barthley and Zorol Barthley. Several measures were taken or proposed between the death of Dr. Barthley in 2005 and the institution of legal proceedings in 2016 by his personal representatives and his son, to resolve the disputes. These measures included the Board of Directors instructing the company’s auditors in September 2011 to assess the basis of the share allocations; then resolving in March 2014 to refer the dispute to arbitration; and then deciding in November 2015 to appoint retired Justice of Appeal Michael Gordon, QC to assess the value of the Barthleys’ shares for the purpose of assisting the Board in allocating the shares. These measures all fell apart for one reason or the other, with the end result being the institution of legal proceedings by

the Barthleys against the company, then under the control of the other shareholders.

- [7] In a Fixed Date Claim filed on 24th March 2016, the claimants, now respondents (being Zona Barthley and Zorol Barthley as the personal representatives of Dr. Barthley, and Zorol Barthley as a shareholder himself) claimed the following relief against the company as defendant:

- “(1) A declaration that the Claimants are shareholders in PIC Insurance Company Ltd.
- (2) A declaration that the failure of the Directors to allot shares to the Claimants is oppressive or is unfairly prejudicial to or disregards the interests of the Claimants, contrary to section 241 of the Companies Act 1995.
- (3) A declaration that the Defendant is estopped from denying that the Claimants own 51% and 5% respectively of the shares of the defendant company.
- (4) A declaration that the decision of the Board of Directors on 19th November 2015 to hire an Assessor to assess the value of the Claimants’ shares is an unlawful use of the company’s resources which is oppressive or is unfairly prejudicial to or disregards the interests of the Claimants, contrary to section 241 of the Companies Act 1995.
- (5) An injunction restraining the Defendant from continuing to deny the Claimants’ status as 51% and 5% shareholders of the company.
- (6) An interim injunction restraining the Defendant from assessing or allotting any further shares until the hearing and determination of the claim.
- (7) An order that there be a trial to determine the extent of the Claimants’ shares.
- (8) An order rectifying the registers or records of the company pursuant to section 241(3)(k) of the Companies Act 1995.
- (9) Further or alternatively, an order rectifying the registers or records of the company pursuant to section 244 (1) of the Companies Act 1995.
- (10) An order that shares be issued and allotted to the Claimants pursuant to reliefs 6, 7, and 8 above.

(11) Damages.

(12) Court Fees.

(13) Costs.

(14) Such further or other relief as the Court deems fit.”

- [8] The company, as the defendant in the proceedings, filed a defence to the claim on 25th April 2016 denying or not admitting pretty much every averment or allegation in the statement of claim; not admitting even that Dr. Barthley’s wife was his widow after his death.
- [9] In essence, the company – whilst admitting the role of Dr. Barthley in the establishment and operation of the company – sought to diminish his rights, entitlement and status arising from that role. Also, whilst admitting the existence of documents – including the annual returns of the company which are required to state, amongst other things, the shareholding and directorship of the company – showing that Dr. Barthley was the owner of 51% of the shares in the company, yet denying that he was the majority shareholder or even, apparently, a substantial shareholder of the company.
- [10] The respondents filed a reply to the defence on 17th May 2016, joining issue with the appellant on the principal denials of the averments in the statement of claim.
- [11] At the trial, the respondents called three witnesses, Zorol Barthley and Mr. Dane Hamilton QC, who gave witness statements and viva voce evidence, and the Superintendent of Insurance at the Financial Services Regulatory Commission, Ms. Claudette Richardson, who was summoned and gave viva voce evidence only. The appellant also called three witnesses, Mr. Stanley Francis, Mr. Claude Anthony and Mr. Rolston Porter, all of whom gave witness statements and viva voce evidence.

[12] At the conclusion of the two-day trial, the trial judge gave judgment in favour of the claimants. By her judgment dated 19th December 2018, the trial judge granted the following relief:

- (1) a declaration that the Claimants are shareholders in PIC Insurance Company Ltd;
- (2) a declaration that the failure of the directors to allot shares to the Claimants is oppressive or unfairly prejudicial to or disregards the interests of the Claimants contrary to section 241 of the **Companies Act 1995**;¹
- (3) a declaration that the decision of the Board of Directors on 19th November 2015 to hire an assessor to assess the value of the Claimants' shares is an unlawful use of the company's resources which is oppressive or is unfairly prejudicial to or disregards the interests of the Claimants contrary to s.241 of the **Companies Act 1995**;
- (4) an order that the shares be issued to the Claimants in accordance with the share allotment document prepared by Mr. Harrigan of Pannell Kerr Foster in 2003;
- (5) costs in accordance with CPR 65.5(2)(b) as this is not a monetary claim and the value was not assessed for the purposes of costs.

The appeal

[13] Being dissatisfied with the judgment, the defendant (now appellant) appealed. By its notice of appeal, filed on 17th January 2019, the appellant advanced 7 grounds of appeal, as follows:

- (1) The learned judge misdirected herself when she trespassed beyond the boundaries of the pleaded case.

¹ Act No. 18 of 1995.

- (2) The learned judge misdirected herself and erred in fact and law and failed to take advantage of her role as the trial judge who heard and saw the witnesses in that, among others,
- (i) The Judge made findings of fact which were not supported by the evidence, and in particular the undisputed documentary evidence;
 - (ii) The Judge made contradictory findings. On the one hand she found as a fact that there were shareholder disputes concerning the proposed or recommended allotment to Dr. Barthley. On the other hand, the Learned Judge said that the de facto shareholders knew of Dr. Barthley's intention to hold 51%. There is no evidence that the de facto shareholders knew of Dr. Barthley's intention or proposal to hold 51% of the shares prior to the meeting of 2005;
 - (iii) The Judge made findings on the alleged intention of Dr. Barthley to hold 51% of the shares, which was not supported by the evidence. In so doing the Learned Judge failed to properly consider, among others:
 - (a) The undisputed evidence of the Second Respondent and Dane Hamilton, QC that the purported allotments presented to the shareholders on 3rd November 2005 by Pannell Kerr Foster were mere "proposals" or "recommendations";
 - (b) There was no evidence that the "proposals" or "recommendations" of the 51% shareholding were agreed by shareholders or the Board;
 - (c) The evidence of the existence of continuing disputes which was accepted by the Judge;

- (d) The evidence that the shareholders had requested that the Board of Directors resolve the disputes;
 - (e) The undisputed evidence that it was Dane Hamilton, QC who recommended arbitration and the appointment of three (3) retired Justices as arbitrators, and that it was the same Hamilton who gave evidence for the Respondents that drafted the very compelling Terms of Reference for arbitration in which he referred several times to the disputes between the shareholders and parties;
 - (f) The undisputed minutes of meetings;
 - (g) There was no evidence of any unanimous agreement by the shareholders on the 51% claimed by the Estate of Dr. Barthley;
 - (h) The evidence, including the documentary evidence, which clearly showed that there existed disputes among shareholders, a matter accepted by the Judge;
 - (i) The fact that no shares were issued because of these disputes; and
 - (j) The indisputable evidence that the Board decided to appoint an arbitrator or assessor to assist in the resolution of these disputes so that the Board could lawfully and fairly issue and allot shares in accordance with sections 29 and 30 of the **Companies Act**.
- (iv) The Judge made a number of findings in paragraphs 17 to 20 of her judgment that the Second Respondent's evidence on the key or material issues lacked credibility. The Judge also made some comments on some of the Appellant's witness on what she described as peripheral issues. Nevertheless the Learned Judge failed notwithstanding her findings or comments on credibility of both sides to properly consider that the Respondents' case was not supported by any evidence, the burden being on them, and/or

that the undisputed documentary evidence which substantially if not wholly supported the Appellant's case on the material facts of the case.

- (3) The learned judge erred when she failed to properly construe and give effect to the provisions of sections 29, 30, [85] and 241 of the **Companies Act**, and relied instead on some wide discretion of the Court.
- (4) The learned judge erred in law and misdirected herself when she held that the Board's decision to retain Counsel to assist in the arbitration or assessment process constituted oppression under section 241 of the **Companies Act**.
- (5) The learned judge erred in granting the oppression remedy when the issue in contention before her and the central dispute was not whether the Respondents were shareholders but the quantum of the alleged shareholdings held by them. This issue of or the disputes on quantum had to be resolved by the Board before it could lawfully issue and allot shares to the shareholders, and the Board decided that the fairest way to do so was with an independent arbitrator and assessor, former Justice of Appeal Michael Gordon, QC.
- (6) The learned judge erred in granting the oppression remedy in the circumstances to coincide with 'The share allocation document drawn up in 2003 by Mr. Harrigan of Pannel Kerr Foster on the instructions of Dr. Barthley' when there was no pleading or evidence that the shareholders had agreed or shared the expectation that their shareholdings were in fact reflected in or would correspond with 'The share allocation document drawn up in 2003 by Mr. Harrigan of Pannel Kerr Foster on the instructions of Dr. Barthley.' There was no agreement by the shareholders.

(7) The judgment of the learned judge is wrong in law and on the facts.

[14] The appellant filed submissions in support of its appeal on 1st August 2019, whilst the respondents filed submissions in opposition to the appeal on 27th December 2019. The appeal was heard on 17th January 2020, with Mr. Anthony Astaphan, QC appearing for the appellant, and with him Dr. David Dorsett and Mr. Jarid Hewlett, and Mr. Kendrickson Kentish and Mr. Kyle Kentish for the respondents.

Issues for determination

[15] In its written submissions, the appellant narrowed down the issues for determination in the appeal, to the following 3 questions:

- (i) Whether the judge erred in making the findings that she did and therefore they ought to be set aside?
- (ii) Whether the judge erred when she failed to properly consider sections 29, 30 and 85 of the **Companies Act** and hold that the Board of Directors was required to assess any claim for shares to determine whether value for money existed before agreeing to issue, allot or transfer shares to the respondents?
- (iii) Whether the judge erred when she held that the decision of the Board to arbitrate or assess the extent or value of the alleged shareholding, or shareholder disputes, including the refusal to pay the legal fees of the Second Respondent, amounted to or constituted oppression contrary to section 241 of the **Companies Act 1995**?

[16] The respondents too, in their written submissions, narrowed down the issues for determination in the appeal to 3 questions, as follows:

- (i) How should the Court treat with findings of fact by the trial judge?
- (ii) Are the Barthleys entitled to 51% and 5% of the shares?

- (iii) Were the actions of the company by its Board of Directors oppressive and unfairly prejudicial to the Barthleys?

[17] I too agree that there are essentially three issues for determination by this Court. The first issue identified by both sides, but differently phrased by each, concerned the factual findings by the trial judge. I prefer the formulation of the issue by the appellant and will adopt it (modified though) as the first issue to be determined by this Court, that is, whether the judge erred in making the factual findings that she did. I also prefer the formulation of the second issue by the appellant, which I will modify to read – whether the trial judge failed to properly consider sections 29, 30 and 85 of the **Companies Act, 1995** and to hold that the Board of Directors was required to assess any claims for shares to determine whether the services provided to the company by Dr. Barthley and Zorol Barthley represented the fair equivalent in money of the value of the shares claimed by them before agreeing to issue, allot or transfer any shares to the respondents.

[18] On the third issue, I do not believe that the formulation offered by either side in this appeal fairly captures the essential question for determination. The appellant cast the net too wide, including in the issues to be determined things which are not part of either the claim made in the court below or the judgment rendered in the court, like the decision by the Board of Directors, rescinded by the date of the filing of the case in the court below, to appoint an arbitrator to resolve the dispute between the Barthleys and the other shareholders on the respective shareholding of Dr. Barthley and the other shareholders, and the refusal by the Board to pay the legal fees of Zorol Barthley. The appellant's formulation, however, whilst including issues which did not fall to be determined by this Court, excluded one of the major claims of the respondents, which gave rise to one of the major orders of the court, that is, the failure of the Directors to allot shares to the claimants being oppressive or unfairly prejudicial to or disregarding the interests of the claimants, contrary to section 241 of the **Companies Act**. The respondents, on the other hand, were too

vague and general in their statement of the issue, merely asking the question whether the actions of the company, by its Board of Directors, were oppressive and unfairly prejudicial to the respondents.

- [19] I would formulate the third issue identified by both the appellant and the respondents in the form of the following question – whether the decision of the Board of Directors to appoint an assessor to assess the value of the respondents' shares and the failure of the Board to allot shares to the respondents were oppressive or unfairly prejudicial to or disregarded the interests of the respondents, contrary to section 241 of the **Companies Act, 1995**.

Issue 1

- [20] The first issue to be determined by this Court is whether the trial judge erred in making the findings of fact that she did. This issue was raised in the appellant's second ground of appeal. In support of this ground, the appellant argued that the trial judge misdirected herself and erred in fact and in law and failed to properly take advantage of her role as the trial judge who heard and saw the witnesses. In support of this argument, the appellant stated *inter alia* that the trial judge made findings of fact that were not supported by evidence, made contradictory findings as it related to the shareholder dispute, and failed to properly consider that the respondents' case was not supported by evidence.
- [21] There are several factual findings identified by the appellant in its skeleton arguments which it claims illustrate the trial judge's failure to properly take advantage of her role as the trial judge who heard and saw the witnesses. The most consequential findings of fact of the trial judge with which the appellant takes issue are those relating to the acceptance by the trial judge of the evidence of Zorol Barthley that the other shareholders of the company had consented during Dr. Barthley's lifetime to him being the majority shareholder of the company, notwithstanding her criticism of Zorol Barthley for making reference in his viva voce evidence to, and seeking to rely on, a document exhibited to his witness

statement when there were no such document exhibited, and despite his evidence appearing at times to be contradicted by documentary evidence which was before the trial judge.

- [22] The response of the respondents to this criticism of the trial judge's findings of fact was to defend the entitlement of the trial judge, having regard to the pleadings and the evidence, to make findings of fact based on her impressions of the credibility of the witnesses who gave evidence at the trial and the strength of the documentary evidence which they relied on.
- [23] Without trudging through the 234 pages of the viva voce evidence given in this case, the five witnesses statements spanning 76 pages, and the 220 pages containing the documents put before the court, the short answer to the appellant's submissions on this first issue and the respondents' submissions in response is that the trial judge had two versions before her of the events surrounding the establishment and operation of the company and, in particular, its shareholding.
- [24] The respondents' version was essentially that Dr. Barthley established and operated the company using his considerable knowledge of and experience in the insurance industry, as well as the contacts which he had established over several years with insurance companies both within and outside of Antigua and Barbuda, and the very high regard in which he was held as 'an Antiguan insurance professional with an international reputation for honesty, integrity and expertise in insurance', to leverage insurance business and reinsurance contracts, which engendered the successful operation of the company as a major player in the insurance industry of Antigua and Barbuda. The respondents contended that Dr. Barthley brought in some of his friends to be shareholders in the company, but with the understanding that he would remain in control of the company, the manifestation of which (in a company limited by shares) would be majority shareholding in the company. They contended too, that all was well whilst Dr. Barthley was alive and ran the company exclusively, and without remuneration,

apart from his shareholding, but as soon as he met his earthly demise in September 2005, his erstwhile friends and business partners started to squabble about the ownership of shares in the company, in particular, his 51% holding, and his son's 5% holding, and even to question his status as the founder and major shareholder in the company. And, all of a sudden, they wanted to ascribe a specific value to his services to the company over the four and a half years between its birth in March 2001 and his death in September 2005 in order to allocate shares to him commensurate with the value ascribed after his death to his services over the four and half years, which created and sustained what appeared to be a very successful insurance company.

- [25] The appellant's version, so far as one can piece it coherently together from the witness statements, documentary and viva voce evidence which came from the three witnesses for the appellant, and elicited in cross examination of the witnesses, was essentially that Dr. Barthley was the CEO of the State Insurance Corporation for several years and that when, around 2001, he spoke with some of his friends about the problems that he was having with Government as his employer, one of his friends, Rolston Potter, came up with the idea of establishing a new insurance company which would rival the State Insurance Corporation. The appellant's witnesses alleged that Dr. Barthley was not the majority or even a major shareholder of the company and that in fact he was an advisor to the company and was paid for his services. They deny any agreement or understanding amongst the shareholders of the company that Dr. Barthley would be the majority shareholder, holding 51% of the shares in the company, and contended that it was for the Board of Directors of the company to determine the value of any services rendered to the company by Dr. Barthley and to allot him shares commensurate with that value. They claimed that they endeavoured to do so after the death of Dr. Barthley, but their attempts to do so were thwarted by the objections of Zorol Barthley and Mr. Dane Hamilton, QC. They admitted that the annual returns of the company for the years ending 31st December 2006, 2007, 2008, 2009, 2010 and 2011 showed that Dr. Barthley was the holder of 5,100

shares in the company, which amounted to 51% of the shares in the company, and Zorol Barthley was the holder of 500 shares, but they contended that these returns do not truly reflect the shareholding of the company and were only filed to prevent the company from being in breach of its statutory obligations to file annual returns. One would think though that knowingly filing a false return (if Dr. Barthley was not in fact the majority shareholder of the company) must be a much more serious breach of the law than merely failing to file a return at the due date.

[26] The trial judge had to choose between these two versions of the events surrounding the establishment and operation of the company and, in particular, to decide whether the Barthleys, as the claimants in the case, had satisfied her on a balance of probabilities that Dr. Barthley was, at the time of his death, and to the knowledge and with the approval or acquiescence of the other shareholders, the holder of and/or entitled to 51% of the shares in the company, and Zorol Barthley was the owner of and/or entitled to 5% of the shares.

[27] It is true that the trial judge had reason to comment adversely on the fact that Zorol Barthley gave evidence about a document which he said was prepared by Dr. Barthley 'which was consistent with the Barthley family having a controlling interest in the new entity' and that the document 'was circulated to all potential shareholders and investors'. The trial judge commented that Zorol Barthley referred to the document as having been exhibited to his witness statement, when it was not in fact exhibited. The trial judge also commented that she found it 'doubtful that such a document ever came into being'.

[28] It is true that there were several documents placed before the trial judge which did not state or reflect the fact that any share allocation was done by the company, with the result that some doubt was cast on the Barthley's insistence that, at the date of his death, Dr. Barthley was the holder of 51% of the shares in the company and Zorol Barthley was the holder of 5%.

[29] It is also true though that there was other evidence, including especially the evidence of Dane Hamilton QC, which was consistent with Dr. Barthley having majority shares in the company, and the trial judge did express in the course of her judgment that she accepted without hesitation the evidence of Mr. Hamilton because he impressed her as 'honest and straightforward'. Moreover, although the trial judge had reason to comment adversely on a particular piece of Zorol Barthley's evidence, this is what she had to say about evidence of the company's three witnesses:

"...I therefore find it hard to accept the denials of the PIC witnesses on that issue as they did not impress me as being particularly helpful or forthright and their dogged refusal to admit seemingly insignificant matters tending to show Dr. Barthley's pivotal role in the establishment and early operation of PIC in the face even of documentary evidence to the contrary, did them little credit."²

[30] It is also true that there were documents placed before the trial judge, especially the annual returns of the company filed at the Company's Registry, which showed that Dr. Barthley was the owner of 51% of the shares in the company.

[31] When confronted with the choice between the two versions of the events leading to the establishment and operation of the company and the allocation of the shares in it, the trial judge chose (and explained why she was choosing) the version presented by the respondents over the one presented by the appellant. This was her right and, indeed, her responsibility as the trier of the facts, and she would therefore have foregone her right and abdicated her responsibility if she had failed to choose between the two versions.

[32] There is a long line of cases, starting from the case of **Watt v Thomas**³ in 1947 and continuing through to several cases over the years, both in England and in the countries of the British Commonwealth, including cases from our own jurisdiction, where the courts have consistently pronounced on the role of appellate courts in

² See paragraph 21 of the judgment below.

³ [1947] AC 484.

dealing with findings of fact made by first instance courts. As recently as last year, this Court – in the Antiguan case of **Flat Point Development Limited v Mary Dooley**⁴ – applied **Watt v Thomas** in affirming the primacy of the role of the trial judge in a civil trial in resolving the factual disputes between the parties. Once the trial judge has done so and has done so based on evidence which was before her, the appellate court should not interfere with the judge’s findings of fact.

[33] In the case at bar, there was evidence from the respondents’ witnesses that:

- Dr. Barthley had been allocated 51% of the shares in the company,
- this was consistent with Dr. Barthley’s establishment and operation of the company, including his devotion of up to four and a half years of unremunerated use of his time, his energies, his resources, his knowledge of the insurance industry and his contacts within it, even the involvement of his family in the running of the business, given the roles played by both his wife and his son in the establishment and operation of the company,
- the other shareholders of the company understood and impliedly agreed to this arrangement, and
- this impliedly-agreed-to majority control of the company by Dr. Barthley was reflected in the annual returns filed by the company for the years ending 31st December 2006 to 31st December 2011.

There was also evidence that Zorol Barthley had been allotted 5% of the shares in the company.

[34] This is only some of the evidence which the trial judge had before her, coupled with the benefit, not available to this Court, of observing the witnesses as they

⁴ [2019] ECSCJ No. 116, delivered on 13th March 2019.

gave their evidence, and of making assessments of their credibility, which enabled her to make the factual findings that she did, and which this Court has no basis to interfere with.

[35] While I do accept that the documentary evidence produced by the respondents in the court below was not extensive and that there were inconsistencies in the respondents' evidence, the documentary evidence produced by the appellant in the court below and the viva voce evidence of its three witnesses did also leave a great deal to be desired and the judge had to determine, and did determine on a balance of probabilities, that she believed the version of events as presented by the respondents; and the appellant has simply not met the threshold set by the House of Lords in **Watt v Thomas**, and in all of the numerous cases which followed **Watt v Thomas**, for appellate interference with the factual findings of the trial judge.

[36] I will accordingly determine the first issue identified for determination in this appeal by holding that the trial judge did not err in making the findings of fact which she did, in particular, the finding that Dr. Barthley was the owner and/or entitled to ownership of 51% of the shares in PIC Insurance Company Ltd. and Zorol Barthley was the owner and/or entitled to ownership of 5% of the shares.

Issue 2

[37] The second issue to be determined in this appeal is whether the trial judge failed to properly consider sections 29, 30 and 85 of the **Companies Act, 1995** and to hold that the Board of Directors was required to assess any claim for shares to determine whether the services provided to the company by Dr. Barthley represented the fair equivalent in money of the value of the shares claimed by him before agreeing to issue, allot or transfer shares to the respondents.

[38] The appellant contended that shares in the company could not be allotted to the Barthleys without compliance by the Directors with sections 29 and 30 of the

Companies Act, 1995 on pain of sanction in accordance with section 85 of the Act. It will be helpful to quote in full the relevant portions of sections 29 and 30 of the **Companies Act, 1995** and the whole of section 85.

[39] Section 29(1) of the Act reads:

“Subject to the articles, the by-laws, any unanimous shareholder agreement, and section 34 shares may be issued at such times, and to such persons, and for such consideration, as the directors may determine.”

[40] Section 30 (1) and (2) of the Act reads:

“(1) A share shall not be issued until it is fully paid

(a) in money, or

(b) in property or past service that is the fair equivalent of the money that the company would have received if the share had been issued for money..

(2) In determining whether property or past service is the fair equivalent of a money consideration, the directors may take into account reasonable charges and expenses of organisation and reorganisation, and payments for property and past services reasonably expected to benefit the company.”

[41] Section 85 of the Act reads:

“Directors of a company who vote for or consent to a resolution authorising the issue of a share under section 29 for a consideration other than money are jointly and severally liable to the company to make good any amount by which the consideration received is less than the fair equivalent of the money that the company would have received if the share had been issued for money on the date of the resolution.”

[42] Senior Counsel, Mr. Anthony Astaphan, appearing as lead counsel for the appellant, submitted that ‘section 30 clearly imposed mandatory obligations on the Board’ and that ‘section 85 imposed a sanction on Directors for the failure to comply with section 30 of the Act’. In accordance with Mr. Astaphan’s submission, the trial judge erred in making the determination that Dr. Barthley was entitled to the ownership of 51% of the shares in the company, and Zorol Barthley to 5%, as per the document prepared by Pannell Kerr Foster in 2003, and in making the declaration that the shares be issued to Dr. Barthley and Zorol Barthley in

accordance with that document, without compliance by the Board with sections 29, 30 and 85 of the Act.

[43] The consequence of Mr. Astaphan's submission is that, on the facts of this case, the company could not have and cannot allocate or issue any shares to Dr. Barthley or to his estate without first calculating 'the fair equivalent' in money of the past service(s) provided by Dr. Barthley in incorporating, establishing, operationalising, and running PIC from the birth of the company in March 2001 to the death of Dr. Barthley in September 2005.

[44] I take the view that the mathematical calculation of the value of past service(s) provided to the company by Dr. Barthley from 2001 to 2005 would (certainly by now) be virtually impossible. But this cannot be taken to mean that, because the value of the past service(s) provided to the company by Dr. Barthley is not measurable in money, that - by virtue of sections 29, 30 and 85 of the Act - shares may not be issued to Dr. Barthley for the incalculable service which he provided to the company. The measure of value of the service(s) provided by Dr. Barthley against the shares allocated to him must then be what was agreed to or acquiesced in at the time by Dr. Barthley and those who joined him as shareholders in the company. The evidence points to the agreement or acquiescence of the shareholders to an allocation of the majority shareholding of the company to Dr. Barthley for his incorporation, establishment, operationalisation and running of the company, using his immense experience and high acclaim in the insurance industry, without any remuneration, but for the ownership of the majority shareholding in the company. This agreement or acquiescence was reflected in the unchallenged control and operation of the company by Dr. Barthley during his lifetime, and the share allocation document prepared by the company's auditors in 2003, even if on the instructions only of Dr. Barthley, who in any event appeared to have been the one making decisions and giving instructions on behalf of the company.

- [45] What is possible though, and indeed both probable and practicable, is for the determination to be made by the Board of Directors of the company, or by the court if necessary, that the unremunerated service provided to the company by Dr. Barthley from initial incorporation to successful operation, would justify his status as the major contributor to and majority shareholder of the company.
- [46] When this is backed by the filing of annual returns by the company for the years ending 31st December 2006 to 31st December 2011 reflecting the ownership by Dr. Barthley of 51% of the shares in the company, with the full knowledge of the other shareholders of the company, including of course the members of the Board of Directors, and without any direction by Dr. Barthley (who by then is deceased), proper consideration of sections 29, 30 and 85 of the Act should or could not lead to a result that the Board of Directors, or the court if the Board failed to do so itself, cannot allocate to Dr. Barthley the 51% of the shares in the company which, on the facts as found by the judge, he was entitled to.
- [47] In those circumstances, the trial judge was entitled to find and to hold that Dr. Barthley was in fact, at the time of his death, the holder of the majority shareholding in the company (51% of its shares) and to order that they be issued to him accordingly. Although the trial judge did not specifically address the impact of sections 29, 30 and 85 of the **Companies Act, 1995** on the ability of the company to issue or allocate shares, there was no error made by her in construing or giving effect to the aforementioned sections of the Act in making the determination and declaration that she did.
- [48] I will accordingly determine the second issue identified for determination in this appeal by holding that the trial judge did not fail to properly consider sections 29, 30 and 85 of the **Companies Act, 1995** and to hold (the trial judge that is) that the Board of Directors was required to assess any claims for shares to determine whether the services provided to the company by Dr. Barthley represented the fair equivalent in money of the value of the shares claimed by him before agreeing to issue, allot or transfer any shares to him.

Issue 3

- [49] The third issue to be determined in this appeal is whether the trial judge erred in declaring that the decision of the Board of Directors to appoint an assessor to assess the value of the respondents' shares and the failure of the Board to allot shares to the respondents were oppressive or unfairly prejudicial to or disregarded the interests of the respondents, contrary to section 241 of the **Companies Act, 1995**.
- [50] The appellant contended that it is a most extraordinary finding for the learned judge to have held that a bona fide attempt by the Board, which is subject to obligations imposed by the **Companies Act, 1995** to resolve shareholder disputes could be considered oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder or burdensome, harsh and wrongful conduct. The appellant submitted that on this basis alone the appeal ought to be allowed, with costs. The appellant further contended that any person claiming to have any rights to shares in a company, or to a percentage of the share capital of a company, ought not to be permitted to utilise the oppression remedy to subvert the rights or obligations of the Board to act in accordance with the provisions of the **Companies Act, 1995**.
- [51] The appellant relied on the Canadian cases of **Mennillo v Intramodal Inc**⁵ and **BCE Inc v 1976 Debentureholders**⁶ in support of its submission. They argued that these two Canadian cases highlight that the discretion to impose an oppression remedy under section 241(3) of the Canada Business Corporations Act 1985 (which is materially identical to section 241(3) of the **Companies Act, 1995** of Antigua and Barbuda) must be exercised on a principled basis. Learned Senior Counsel Astaphan stated that in another Canadian case, **Wilson v Alharayeri**,⁷ the Supreme Court of Canada held that at least four general principles should

⁵ 2016 SCC 51.

⁶ 2008 SCC 69.

⁷ 2017 SCC 39.

guide courts in fashioning a fit remedy under section 241(3) of the Canada Business Corporations Act, 1985. First, the oppression remedy must in itself be a fair way of dealing with the situation, although the fairness principle is ultimately unamenable to formulaic exposition and must be assessed in light of all the circumstances of a particular case. Second, any order should go no further than necessary to rectify the oppression. Third, any order may serve only to vindicate the reasonable expectation of security holders, creditors, directors or officers in their capacity as corporate stakeholders. Fourth, a court should consider the general corporate law context in exercising its remedial discretion.

[52] The appellant submitted that both Zorol Barthley and Dane Hamilton, QC admitted that there were shareholder disputes, voted for arbitration and approved the terms of reference. Accordingly, the appellant contended, the respondents ought not to be allowed to repudiate the factual basis for the arbitration simply because the Board decided not to pay Zorol Barthley's costs. The appellant contended further that the purpose of arbitration was to allow shareholders or persons claiming to be shareholders to substantiate payment or consideration for the shares which they claimed. In these circumstances, the appellant submitted, the respondents could have no reasonable expectations that the Board should pay their legal costs.

[53] In response, the respondents submitted that their pleadings in the court below and the evidence led by them clearly establish the reasonable expectation of the Barthleys that Dr. Barthley would be the majority shareholder in the company and that Zorol Barthley would be the holder of 5% of the shares. Furthermore, the respondents contended that one of the appellant's witnesses, Mr. Rolston Potter, admitted under cross-examination that only some shareholders were opposed to Dr. Barthley having a controlling interest in the company, and this only after Dr. Barthley's death.

[54] The respondents also submitted that Zorol Barthley was not at the initial Board meeting when it was decided to appoint an assessor to assess the value of the

respondents' shares. They contended that at a subsequent meeting he was asked about the decision to appoint the assessor and he agreed to it in the absence of any documentation and without advice. They contended further that, having realised that the company was treating him unfairly, Zorol Barthley withdrew his support of the appointment.

[55] In Antigua and Barbuda, Division L of the **Companies Act, 1995** sets out civil remedies which can be pursued by complainants in relation to companies, which include relief under the oppression provisions in section 241 of the Act.

[56] Prior to the introduction of statutory reforms, the rights of minority shareholders (and others not in control of the levers of power of the company) as against those controlling the company, were very limited. In enacting section 241 of the **Companies Act, 1995** Parliament gave the courts a very broad discretion, applying general standards of fairness, to decide cases coming before them on their merits. Andrew Burgess, in his book titled "**Commonwealth Caribbean Company Law**",⁸ makes the following observation on the oppression remedy provisions in the Companies Acts of Commonwealth Caribbean countries, including Antigua and Barbuda:

"These provisions are not a codification of the common law; rather, they are intended to confer upon individual shareholders and other complainants a remedy which removes the impediments of the rule in *Foss v Harbottle* [which held that only the company itself could sue its directors for a breach of their duty to it] and ensures that they are insulated from conduct that is oppressive or unfairly prejudicial or that unfairly disregards their interests."

[57] As has been agreed by both sides in this appeal, section 241 of the **Companies Act, 1995** is modelled on section 241 of the Canada Business Corporations Act, 1985. Section 241 empowers the court to provide redress to corporate stakeholders for corporate conduct that has been exercised in a manner that is oppressive, or unfairly prejudicial to, or that unfairly disregards their interests.

⁸ Andrew Burgess, *Commonwealth Caribbean Company Law* (Commonwealth Caribbean Law Series, Routledge, Oxon 2013) at p. 330.

[58] In **BCE Inc. v 1976 Debentureholders**, the Supreme Court of Canada extensively reviewed the law on oppression. The Court considered that the best approach to the interpretation of section 241(2) is one that combines the two approaches developed in the cases:

“One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.”

[59] The Supreme Court of Canada made two preliminary observations in that case. Firstly, oppression is an equitable remedy. It seeks to ensure fairness. It gives a court a broad, equitable jurisdiction to enforce not just what is legal, but what is fair. Secondly, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context. Conduct that may be oppressive in one situation may not be in another.

[60] As it relates to the reasonable expectations of these stakeholders, the test is objective. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be just and equitable to grant a remedy; the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[61] It is clear, from the above-mentioned authorities cited, that fair treatment is the central theme running through the oppression remedy jurisprudence. It is fundamentally what stakeholders are entitled to reasonably expect. In the instant case, the claimants claimed that they were denied fair treatment by the Board of Directors as it relates to their shareholding in the company.

[62] In considering the parties' submissions on the utilisation of the oppression remedy in this case, it needs first be pointed out that the appellant did not correctly

represent the respondents' application for the remedy or the trial judge's grant of it. Application was neither made by the respondents nor granted by the judge for the oppression remedy to be applied on the basis of the decision of the Board of Directors to appoint an arbitrator or the refusal of the Board to pay Zorol Barthley's legal fees on an assessment to be undertaken by Mr. Michael Gordon, QC. The application for and grant of section 241 relief was based on the Board's decision to appoint an assessor to assess the value of Dr. Barthley's shares and the Board's refusal to allot the shares to him in accordance with what the respondents contended was agreed to or acquiesced in by the other shareholders, as reflected in the share allocation document prepared by the company's auditors, the non-objection by any of the shareholders to the aforesaid document or to Dr. Barthley's overall control of the company, and as reflected as well in the annual returns filed by the company for the years ending 31st December 2006 to 31st December 2011.

[63] In considering the parties' submissions, it needs also to be recognised that the trial judge found, and I have concluded that she was entitled to so find, that Dr. Barthley was the owner of and/or entitled to ownership of 51% of the shares in the company, and that sections 29, 30 and 85 of the **Companies Act, 1995** did not impede the Board of Directors from allotting or issuing these shares to him or the court from ordering that they be issued to him.

[64] It needs be said too, in considering the parties' submissions, and the submissions of the appellant in particular, that the four principles set out by the Supreme Court of Canada in the case of **Wilson v Alharayeri** were applied in the case at bar because, firstly, the oppression remedy was a fair way of dealing with the situation placed before the court, secondly, the declarations and orders made by the trial judge were necessary to meet the justice of the case and did not go any further than was necessary to rectify the oppression, thirdly, the orders served to vindicate the reasonable expectations of the Barthleys that the status of Dr. Barthley as the majority shareholder of the company would be acknowledged and given effect to and, fourthly, that there is no indication that the corporate law

context of the claim and remedy were not considered by the court in the exercise of its remedial discretion.

[65] In the face of the findings by the trial judge and the principles set out in **Wilson v Alharayeri**, and given the powerlessness of the respondents without order of the court to move the Board of Directors to do what the respondents contended and the court agreed ought properly to be done in relation to the allotment of the shares to Dr. Barthley, and to restrain the Board of Directors from doing what ought not to be done in relation to the appointment of the assessor, the trial judge was entitled to determine, and did not err in her determination, that these decisions of the company, acting through its Board of Directors, were oppressive or unfairly prejudicial to or disregarded the interests of the respondents, contrary to section 241 of the **Companies Act, 1995**.

[66] I will accordingly determine the third issue to be determined on this appeal, by holding that the trial judge did not err in declaring that the decision of the Board of Directors to appoint an assessor to assess the value of the claimants' shares and the failure of the Board to allot shares to the claimants were oppressive or unfairly prejudicial to or disregarded the interests of the claimants, contrary to section 241 of the **Companies Act, 1995**.

[67] I did not for the most part specifically address the claim by Zorol Barthley to, and the award to him by the trial judge of, 5% of the shares in the company, but it is clear that the ownership and/or entitlement of Zorol Barthley to these shares is inextricably linked to Dr. Barthley's majority shareholding in the company, because the services which Zorol Barthley claimed to have rendered to the company were essentially services undertaken by him alongside and at the behest of Dr. Barthley, and the share allocation to him appeared to be at the direction of Dr. Barthley. The trial judge also did not err therefore in declaring Zorol Barthley to be the owner of and/or entitled to ownership of the 5% shareholding in the company.

Conclusion

[68] For the reasons stated above, the appeal is dismissed and the judgment of Joseph-Olivetti J [Ag.] is affirmed. The appellant shall pay the respondents' costs of two-thirds of the costs awarded in the court below.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar